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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

HOME LAND AND CATTLE COMPANY, a Corporation, and THE NATIONAL BANK OF COMMERCE, a Corporation,
Appellants,

vs.

CORNELIUS J. McNAMARA and THOMAS A. MARLOW,
Appellees.

PETITION FOR REHEARING.

H. G. McINTIRE,
S. H. McINTIRE,
FOR APPELLEES.

JOHN S. MILLER,
OF COUNSEL.

BARNARD & MILLER PRINT. CHICAGO.

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I.

The opinion of the court first states one of the contentions upon the part of the appellants to be

> "That the appellees cannot demand the specific performance of the contract for the reason that they themselves failed to carry out its provisions by refusing to pay the $23,325 which under the contract became due upon the delivery of the cattle which were turned over to and received by the appellees upon October 21st and 22nd."

And after considering some of the terms of the contract and facts in proof, the opinion states:

> "The appellees had no legal excuse, therefore, for refusing to pay the $23.375 which was due under the contract upon the delivery of the cattle on October 22nd. They had no right to withhold the money or to apply it on their claim for damages. Their damages, if any they sustained under the contract, had not been liquidated. By refusing to make the payment they violated a material provision of their agreement. Their refusal to pay justified the appellants in declining to make further delivery of cattle, and it effectually bars them now from suing in equity for the specific performance of the contract."

Passing by, to be considered later, the intervening portion of the opinion, which is above omitted, we here beg leave to submit that, in the above holding, the court has overlooked the rule, which has been laid down in many cases, and is here quoted from the decision of the Circuit Court of Appeals in the Sixth Circuit, in *Cherry Valley Iron Works* v. *Florence I. R. Co.,* 64 Fed. Rep., 572, as follows:

> "The contract being entire, as soon as the parties had entered upon its performance by partial delivery and payment, the mere failure of the vendee to make the subsequent payments would not of itself absolve the vendor from proceeding with the deliveries."

That decision follows the decisions of *Iron Co.* v. *Naylor,* 9 App. Cas., 434, in the English House of Lords, and *Norrington* v. *Wright,* 115 U. S., 188, 203, 204. And we beg here again to refer to the following cases, where the rule has been clearly laid down, which were cited in the former brief for appellees, and which, with great respect, we ask the court to consider:

Otis v. *Adams,* 56 N. J. L., 38; s. c. 37 Atl. Rep., 1093.

Gerli v. *Poidebard Silk Mfg. Co.,* 57 N. J. L., 435; s. c. 31 Atl. Rep., 402.
Bogardus v. *N. Y. L. Ins. Co.,* 101 N. Y., 335.
Myer v. *Wheeler,* 65 Iowa, 390.
West v. *Bechtel* (Mich.), 84 N. W. Rep., 69.

We beg to ask the court's attention to the case of *Myer* v. *Wheeler,* 65 Iowa, 390. There the plaintiffs contracted to sell and deliver to the defendants ten carloads of barley, which plaintiffs had the right to deliver in lots of one or more cars at a time and draw on defendants for the amount of each separate delivery at the time it was made. Plaintiffs shipped one car and drew a draft for the same, which defendants refused to pay on the ground that the car did not correspond to the sample, and wrote plaintiffs that they had given them credit for the carload at the reduced price of five cents per bushel and that they would pay for drafts for future deliveries, but intended to retain the amount due on the carload received until all the barley should be delivered. Plaintiffs refused to assent to this, demanded payment for the carload delivered and informed defendants that they would deliver no more until such payment was made, but expressed a willingness to deliver the balance if such payment was made. No further deliveries were made, and plaintiffs sued defendants for the carload delivered. The price of barley had advanced. Plaintiffs were given judgment for the carload delivered, and defendants were awarded damages for the non-delivery of the nine carloads not delivered. This judgment was affirmed by the Supreme Court, who said:

> "The rule established by the decided weight of authority, both in England and this country, is that rescission of a divisible contract will not be allowed for a breach thereof unless such breach goes to the

whole consideration. *Freeth* v. *Burr,* L. R. 9 C. P., 208; *Mersey Steel & Iron Works* v. *Naylor,* L. R. 9 Q. B. Div., 648; *Simpson* v. *Crippin,* L. R. 8 Q. B., 14; *Newton* v. *Winchester,* 16 Gray, 208; *Winchester* v. *Newton,* 2 Allen, 492; *Sawyer* v. *Railway Company,* 22 Wis., 403; *Burge* v. *Cedar Rapids & M. R. R. Co.,* 32 Iowa, 101; *Hayden* v. *Reynolds,* 54 Iowa, 157; s. c., 6 N. W. Rep., 180. See, also, the collection of authorities on the subject in the note of Mr. Lucius S. Landreth to the case of *Norrington* v. *Wright,* 21 Amer. Law Reg., 395."

And we beg to ask the court to consider the case of *West* v. *Bechtel,* lately decided by the Supreme Court of Michigan and reported in 84 N. W. Rep., 69, which has many facts similar to the case at bar.

II.

If it be considered that the principle above invoked is one which involves the *legal* rights of the parties to the contract, when brought before the court in an action at law, and has no application in a suit in equity for specific performance where a remedy which is purely equitable and in great part discretionary is invoked, then we beg further to suggest:

We recognize that specific performance is a purely equitable remedy, and that it is held that the granting of it rests in the sound discretion of the court; that the inquiry may be whether in equity and good conscience the court ought to grant the relief, and that the court may hear evidence of and inquire into the circumstances under which the contract was entered into and concerning its subject-matter, which could not be done in an action at law.

Espert v. *Wilson,* 190 Ill., 629, 635.

But does the court here place its refusal upon such ground? It is submitted that this should be made clear.

If the court does not place its refusal solely on that ground, but goes upon legal principles which obtain in a court of law, then the rule laid down above in the first division of this petition clearly applies and controls.

But if the court conceives that legal rules and principles are not applicable here, but this case is determined on rules governing this equitable remedy, then we ask the court to consider whether these following considerations are not sound and whether they have been fully weighed by the court, viz.:

For the purposes even of a bill for specific performance, we respectfully submit that the contract and case, on this question, has been misconceived. After stating the above contention of appellants, the opinion proceeds:

> "The contracting parties, at the time of entering upon the contract, had estimated the herd of cattle at 30,000 head. It was known that it consisted of two grades, beef cattle and stock cattle. It was believed that of the former there were 9,000 head, and the Cattle Company so guaranteed. *The price of $25 per head for the whole herd was agreed upon on that basis.* The beef cattle were more valuable than the stock cattle. The testimony on behalf of the appellees is *that but for the guaranty that there were 9,000 head of the beef cattle, they would have paid no more than $23 per head for the herd.*"

In other words, in consideration of this guaranty by the appellants and of their undertaking to pay $20 per head for every head less than 9,000 of such beef cattle so delivered, the appellees on their part undertook to pay $2 per head more for a herd of 30,000 head than they would otherwise have paid. That is, appellees assumed the lia-

bility, in effect, to pay an amount which the parties expected would be $60,000 more because of this guaranty and agreement of appellants to pay $20 per head in case of shortage of 9,000 head of beef cattle; and the agreement of appellants in clause 9 was consideration for (*i. e.*, payment of) that undertaking of appellees. It is submitted that the following statement of the opinion, which immediately follows that above quoted, is not, as applied to this case, sound, but should be reconsidered, viz.:

> "It must be borne in mind that this provision for forfeiture of $20 per head for shortage in the stipulated number of beef cattle does not provide for general damages for breach of the contract. It does not relate to the stock cattle, nor does it contemplate damages for failure to deliver the full 30,000 head. If, for instance, there had been a delivery of 9,000 head of beef cattle under the contract and no other cattle whatever had been delivered the provision in the contract for forfeiture would not have applied to such a breach."

This provision is not a "provision for forfeiture." It provides not alone damages for shortage of beef cattle, but compensation for the undertaking of appellees to pay $25 per head for the herd, instead of $23.

The contract contemplated that there was a herd of 30,000 head of cattle. In considering the validity and meaning of the contract, or any clause thereof, and in arriving at the intention of the parties therein, that fact must be taken into consideration. The construction and validity of Clause 9 of the contract is to be arrived at in view of that contemplated fact and situation. Then it is to be taken that the appellees,—assuming here the situation and facts contemplated by the parties, that there was a herd of 30,000 cattle (if the appellants be given

the benefit of honestly believing that they had such a herd)—paid full consideration and equivalent for the undertaking of appellants to pay $20 per head for shortage of beef cattle. The appellees agreed to pay, and according to the contemplation of the parties would pay $60,-000—viz.: $2 per head for 30,000 head—for this guaranty and undertaking of the appellants in clause 9. The said undertaking of appellants in clause 9 to pay $20 per head was not then a penalty. To say, then, that clause 9 "does not relate to the stock cattle," when appellees had agreed to pay so much more for them because of that clause, is, we submit, a misconception. To say that clause 9 "can be regarded in no other light than as a stipulation for penalty," is, we submit, a misconception. *Intent* of the parties at the time of making the contract is here controlling; and where, as here, the agreement of appellants in Clause 9 to pay $20 per head of shortage in beef cattle, was itself pay for something else which they got by the contract, then it is not a penalty, but is a valid agreement. *Johnston* v. *Cowen,* 59 Pa. St., 275; *California Steam Nav. Co.* v. *Wright,* 6 Cal., 258.

III.

The contract in question provided as follows:

> "That said party of the first part, for and in consideration of the sum of one dollar and other valuable considerations, hereby agrees to sell to said second parties all of their herd of stock cattle, including steers—said herd consisting of thirty thousand head (30,000) more or less, now ranging upon the ranges in Valley, Dawson and Custer Counties, Montana, and being branded as follows, to wit:" (1 Print. Trans., 13.)

It is respectfully submitted that the parties contemplated, and the vendors undertook and covenanted, that the herd of cattle consisted of 30,000 head, more or less. It was not, then, contemplated that the number of cattle actually to be found in the herd would be about 16,000; and the contract is not to be construed, or its validity or meaning or the intention of the parties arrived at, by considering its application to the case of a herd of 16,000 cattle. Its validity and the validity and nature of the agreements therein, are to be arrived at by looking at the contract and the intention of the parties therein, by considering its application to the herd of cattle which the parties contemplated was in existence and not to a herd consisting of a number which the parties did not contemplate. And this is true in considering the nature and validity of clause 9 of the contract, containing the guaranty of appellants that there should be 9,000 head of beef cattle, and their agreement to pay $20 per head for any shortage therein. This is true in equity, in a case of specific performance, where the court is freer to inquire into the circumstances under which the contract was entered into.

Espert v. *Wilson, supra.*

The *intent* of the parties is mainly to be considered in determining whether the agreement of appellants in Clause 9 is a penalty or not. *Sutton* v. *Howard,* 33 Ga., 536; *Sanford* v. *First N. Bank,* 94 Iowa, 680; *Gowen* v. *Gerrish,* 15 Me., 273; *Mead* v. *Wheeler,* 13 N. H., 275; *Hurd* v. *Dunsmore,* 63 N. H. 171; *March* v. *Allabaugh* 103 Pa. St., 335.

We submit that the opinion considers the validity and nature of clause 9 *as if the parties had contemplated a*

herd of 16,000 head, instead of a herd of 30,000 cattle. Is not this a misconception? Supposing there had been 30,000 head of cattle, as was contemplated by the contract, and there had been a shortage in the number of beef cattle of any amount, it will be seen that the provision of clause 9 of the contract had been more than paid for and was for only fair, indeed small compensation, for the consideration given therefor. Supposing there had been 1,000 head of shortage in the beef cattle; that is, suppose there had been 8,000 head of beef cattle and 22,000 head of stock cattle. In that event, according to the evidence, the appellees had paid for this agreement of appellees in clause 9, $2 per head on the cattle more than they would have paid; that is, they had paid $60,000 more than they would have paid but for the guaranty that there should be 9,000 head of beef cattle, while under clause 9 the appellees would receive $20 per head for the 1,000 short, or $20,000, which was very inadequate measure of compensation. Supposing there had been 2,000 head of beef cattle short. Then appellees would have received under clause 12, $40,000, under a clause for which they had paid $60,000. Supposing that the shortage of beef cattle was 3,000 head. Then, by the payment of the $20 per head under clause 9, appellees would only have received as much under clause 9 as they had paid to get it.

The fact that the appellants were unable to fulfill their covenant or the terms of their sale, to deliver the number of cattle which their contract contemplated and called for, does not entitle them to a more favorable ruling on the validity and nature or construction of the contract than they would receive if the herd had in fact consisted of 30,000 head. The court in arriving at the validity, nature and meaning of the clause of the contract in ques-

tion is to place itself in the situation of the parties at the time the contract was made. It is not to take the situation of the parties under circumstances which the parties never contemplated.

It is, therefore, respectfully submitted that the following portion of the opinion should be reconsidered:

> "There is no ground for the contention that the provision requiring the Cattle Company to pay the appellees $20 per head for all the beef cattle that fell short of the 9,000 head so guaranteed, is equivalent to a rebate from the purchase price upon the theory that the stock cattle were less valuable than the beef cattle."

Not merely "upon the theory that the stock cattle were less valuable than the beef cattle." But appellees made their agreement of purchase by which they agreed to pay $2 per head more for all the cattle—stock cattle and beef cattle—than they would have paid. That is quite a different theory. If they had purchased the herd without this Clause 9 (and had thereon gotten the 16,000 head as now) they would have paid therefor two dollars per head less; that is, for 16,000 cattle the sum of $32,000 less.

Has not the theory here been misconceived? It was equivalent to such rebate, on the theory, also, that appellants' payment to appellees of $20 per head of shortage of beef cattle should be taken as making them good for paying two dollars per head more for the entire herd. Considered as such a rebate, it corrected, with substantial or approximate fairness, this overpayment of $2 per head, under the circumstances here, of a delivery of 16,000 head.

The opinion proceeds:

> "The facts fully contradict this theory. It is proven that at the stipulated price of $25 per head the appellees, although they received less than the stipulated number of cattle, received better cattle than their contract called for. The number of cattle actually found to be in the herd, instead of 30,000 was about 16,000 head, but the proportion of beef cattle to the stock cattle in the herd as delivered was much greater than the proportion contemplated in the contract. By the terms of the contract considerably less than one-third of the herd were to be beef cattle. As the cattle were actually delivered nearly one-half were beef cattle. It is apparent, therefore, that there was no damage to the appellees by reason of the disparity in value between the stock cattle and the beef cattle which they had received; on the contrary, that disparity was to their advantage."

It is submitted that the opinion here has overlooked the fact that "disparity in value between the stock cattle and the beef cattle," which might, under any possible circumstances,—even under circumstances not contemplated by the parties or which were in breach of the appellants' covenant or undertaking,—exist, was not the damage for which the agreement in Clause 9, of appellants, to pay $20 per head for shortage of beef cattle, was intended as a compensation. Here, again, it is to be observed that the validity and nature of the agreement in clause 9,—*i. e.,* whether it is a penalty or otherwise,—is to be taken in view of the circumstances contemplated by the parties as existing, and which the appellants undertook and covenanted to exist, namely, that there were 30,000 head, more or less. If clause 9 was a fair and valid undertaking for a herd of 30,000 head, it was not less a fair and valid undertaking because the appellants failed to deliver 30,000 head. Appellees purchased and undertook

to pay $2 per head more for 30,000 head of cattle, for which agreement appellants covenanted that if there were less than 9,000 beef cattle they would pay $20 per head of such shortage. Now, the fact that appellants failed to deliver the 30,000 head and delivered only 16,000, does not make their undertaking a penalty which would have been a fair agreement if they had complied with their undertaking and delivered the 30,000 head.

The opinion continues:

> "The bill alleges, it is true, that the cattle under the contract possessed 'a special and peculiar value' to the appellees 'which could not be adequately compensated for in money damages.' This averment is evidently inserted for the purpose of showing that the case is one for specific performance; it does not relate to the beef cattle especially, but to the whole number of cattle contracted for. There is no averment in the bill that the beef cattle possessed special value and there is no allegation upon which it may be predicted that the appellees sustained special damages for the failure to deliver the beef cattle, or any damages other than those which resulted from the increase in value of the cattle. Not only is there no such averment, but there is no evidence whatever of such damage. It appears from the testimony that more than one-half of the beef cattle which were received by the appellees under the contract were, immediately upon delivery to them, at different times, consigned to the market at Chicago, and one of the appellees testified that no more than 1,000 head of them were used in filling their contracts with the Indian agencies, and that the appellees were not damaged so far as their beef contracts were concerned by the failure of the appellants to deliver the remainder of the 9,000 head. The provision for the payment of $20 per head for each head short of the 9,000 did not provide, therefore, for actual damages or for an equitable compensation to the appellees in case of a breach of the guaranty, *in any view of a possible deficiency in the guaranteed number of the beef cattle.*"

May we suggest that evidence as to the special value of the 457 head of cattle, as to which specific performance was decreed, has escaped the notice of the court. Appellee, Marlowe, testifies that they had such value (Pr. Trans., 350). And that a very considerable number of them (which in fact came into appellees' hands) were so used. (*Id.*, 351-2.) And so appellee, McNamara. (*Id.*, 473-4.) And his testimony showed that the appellees would be damaged in their beef contracts by not getting the beef cattle of the 457 head, and that such damage could not be estimated in money. (*Ibid.*) The fact that only part of the previous deliveries were used with the Indian agencies does not tend to show that future deliveries or the 457 head were not required for that purpose. Has not this evidence been overlooked? Is there not evidence of such special and peculiar value which sustains the findings and decree?

Again, the opinion in the last clause, above quoted, challenges us to suggest "any view of a possible deficiency in the guaranteed number of beef cattle," in which the provision of Clause 9 for payment of $20 per head of shortage would provide for equitable compensation.

Now, we beg to ask whether the supposed deficiency which the opinion then proceeds to assume, is not one which might be selected to sustain its view, but was not at all one which the parties contemplated in making the contract. It proceeds:

> "It can readily be seen, for instance, that if one-half of the 16,000 head delivered had been beef cattle there would have been a shortage of 1,000 beef cattle under the contract, involving a forfeiture of $20,000 for a breach which would have occasioned no damage whatever to the appellees; or if the 16,000 head delivered had been all stock cattle and there had been

> a total failure to furnish any beef cattle whatever, the forfeiture would have been $180,000, a sum vastly in excess of any possible damages."

Suppose, on the other hand, there had been 30,000 head, as the parties contemplated, and of that herd 6,000, 7,000 or 8,000 (and not 9,000) were beef cattle and the rest were stock cattle. We submit that the question of the validity of clause 9 is to be considered, not as if the parties had contracted in contemplation or reference to a herd of 16,000 head; but a herd of 30,000 head. In the case, we supposed, *i. e.,* a herd of 30,000 head but a shortage of 1,000, 2,000 or 3,000 head in beef cattle; would the following conclusion of the opinion be sound:

> "In short, it is evident under the facts of the case that the appellees could sustain no injury from the breach of the guaranty except that which resulted from the increase in the value of the beef cattle during the season of 1897, a contingency that was not foreseen, the amount of which increase could not be pre-estimated, and which the referee has found was in fact $5 per head, a sum greatly disproportionate to the stipulated forfeiture. The provision can be regarded in no other light, therefore, than as a stipulation for a penalty. It calls for the payment of a sum of money greatly in excess of the actual damages, and it is a case where the damages could have been easily ascertained by proof of the market value of the cattle at the time of the breach of the contract. Such provisions the courts uniformly refuse to sustain, leaving the party injured by the breach to his remedy at law for the recovery of his actual damages. 1 Sutherland on Damages, 490."

IV.

The contract in question was made in Illinois, and not in Montana. (1 Print. Trans., 12.)

The portion of clause 9 by which the appellants undertook to pay to appellees the $20 per head for shortage of beef cattle, provides that should the appellants fail to deliver to appellees during the season of 1897 not less than 9,000 head of beef cattle, "they hereby agree to pay to said second parties the sum of twenty dollars ($20) in cash for each and every head less than nine thousand (9,000) head of such cattle so delivered." (*Id.*, p. 15.) That covenant to pay is not, by its terms, to be performed in Montana. Other portions of the contract are to be performed, some in Chicago, Illinois, and others in Montana. It is submitted that the validity and nature of the clause in question, for the payment of the $20, is not governed by the laws of Montana, but by the *lex loci contractus,* namely, the laws of Illinois. *Brown* v. *American Finance Co.,* 31 Fed., 516; *Annheuser-Busch Brewing Assn.* v. *Bond,* 66 Fed., 653, s. c., 13 C. C. A., 665, 32 U. S. App., 38.

It will be borne in mind that the guaranty of the appellants to deliver 9,000 head of beef cattle was valid and free from any question; it is only the validity of the covenant of the appellants to pay which is here involved. It is submitted that that is to be governed by the laws of Illinois, where the contract was made.

Now, by the laws of Illinois, the undertaking of the appellants to pay the $20 per head would not be invalid, but is valid. In *Paine* v. *Weber,* 47 Ill., 41, the court

said that "unless there is good cause for it a court cannot declare a stipulated sum which the parties themselves have said to be the amount of damages, to be a penalty merely."

In *Poppers* v. *Meagher,* 148 Ill., 192, 205, the court, after considering the previous decisions of that court, said:

> "The rules deducible from these cases may be stated: First, where, by the terms of a contract, a greater sum of money is to be paid upon default in the payment of a lesser sum at a given time, the provision for the payment of the greater sum will be held a penalty; second, where, by the terms of a contract, the damages are not difficult of ascertainment according to the terms of the contract, and the stipulated damages are unconscionable, the stipulated damages will be regarded as a penalty; third, within these two rules parties may agree upon any sum as compensation for a breach of contract."

This case is one not governed by the first or second of said rules, but is clearly a case where the third rule applies.

In further support of this petition, we beg to refer to the former brief for appellees; and to ask that upon consideration thereof and of this petition this case may be reheard.

Respectfully submitted.

H. G. McIntire,
S. H. McIntire,
Solicitors for Appellees.

The undersigned counsel for appellees in the above case certifies that in his judgment the foregoing petition for rehearing is well founded, and that it is not interposed for delay.

(Signed) H. G. McIntire,
John S. Miller.